Supreme Court, U.S.
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No. 09- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ROLAND C. MRACEK,

Petitioner,

v.

BRYN MAWR HOSPITAL;
INTUITIVE SURGICAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Eastern District of Pennsylvania and thereafter the Third Circuit Court of Appeals apply the factual record and the appropriate legal standards when entering summary judgment to Respondent pursuant to Fed. R. C. P. 56 in a manner that significantly conflicts with the uniform course of decisions previously made on similar questions by the Third Circuit and other Courts of Appeals, so as to warrant the issuance of a Writ of Certiorari?

SUGGESTED ANSWER: YES.

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The opinion of the Third Circuit Court of Appeals, filed January 28, 2010 is affixed to the Appendix and was unreported. Similarly, the March 11, 2009 order and opinion of the Eastern District of Pennsylvania is affixed to the Appendix and was likewise unreported.

BASIS FOR JURISDICTION

Jurisdiction for the immediate Petition for a Writ of Certiorari is invoked pursuant to 28 U.S.C.S. § 1254(1) within ninety (90) days of the Third Circuit's January 28, 2010 Order affirming the entry of summary judgment by the Eastern District of Pennsylvania which docked on March 11, 2009, and disposed of all parties' respective claims.

Accordingly, Petitioner's request for a Writ of Certiori is timely before this Honorable Court, which has previously held that it will grant certiorari to review decisions of United States Court of Appeals wherein said decisions present conflicts with uniform course of decisions previously made on the same question by other Courts of Appeals. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962), 8 L. Ed. 2d 39, 82 S. Ct. 913.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Due to the fact that the provisions involved are lengthy, their citation alone suffices at this point. The non-federal citation is as follows:

Pennsylvania Rule of Civil Procedure 4003.5:

> **Rule 4003.5. Discovery of Expert Testimony. Trial Preparation Material**
>
> (a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:
>
> (1) A party may through interrogatories require
>
> (a) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and
>
> (b) the other party to have each expert so identified state the substance of the facts and opinions to which the expert is

expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

(2) Upon cause shown, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

(3) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to

scope and such provisions concerning fees and expenses as the court may deem appropriate.

(b) An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

(c) To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, the direct testimony of the expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings as set forth in the deposition, answer to an interrogatory, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings. *Id.*

STATEMENT OF THE ISSUE INVOLVED

Whether the Third Circuit and the Eastern District Court of Pennsylvania, in a manner that significantly conflicts with the uniform corse of decisions previously made on similar questions by the Third Circuit and other Courts of Appeals, entered summary judgment in favor of Respondent, pursuant to Fed. R. C. P. 56.

STATEMENT OF THE CASE

A. *Factual Background*

In October, 2004, Petitioner had a prostate biopsy performed, which indicated that three out of six regions were positive for adenocarcinoma of the prostate. Petitioner subsequently met with Dr. David McGinnis at the Bryn Mawr Urology Group. During this meeting, it was recorded that Mr. Mracek had no erectile dysfunction, and was quite concerned about erectile dysfunction as a consequence of any treatment of his prostate cancer. On March 31, 2005, Dr. McGinnis met again with Petitioner, and informed him that the daVinci surgical robot, which was designed, manufactured, and produced by Respondent Intuitive Surgical, would be used for the radical prostatectomy so as to minimize the risk of erectile dysfunction, and scheduled the surgery for June.

Petitioner exhaustively researched the daVinci robot himself, and was led to believe that the use of the daVinci robot would minimize the risks of erectile dysfunction, especially when compared to having the surgery performed laparoscopically without the robot. As a direct

result of representations made by and on behalf of Respondent Intuitive Surgical and its product, Petitioner decided to go forward with a robotic prostatectomy. On June 9, 2005, Petitioner was placed under general anesthesia and the daVinci robot was brought in, parked on the floor, and surgery was commenced. The surgical team, led by Dr. McGinnis, got part way through taking Petitioner's bladder down and dividing the urachus when, suddenly, the robot started displaying error messages. The surgical team restarted the robot and was only able to make minute progress before the machine again started displaying error messages.

As a result of the error messages, the surgical team was forced to undock the robot from its trocars and attempted to restart the robot multiple times. The surgical team also attempted to place a call to Intuitive Surgical tech support. The local daVinci representative was summoned to the operating room and attempted to assist the surgical team troubleshoot the robot. Despite attempts to make the robot operational, including repositioning the robots arms and multiple redocking of the daVinci robot, the robot completely failed to function. Dr. McGinnis made a final attempt to use the daVinci machine, in which he tried to use the robotic camera arm to run the camera while he did the rest of the surgery laparoscopically. However, the robot was not compliant, and would not allow the team to manually reposition the camera arm.

As a result of the daVinci malfunction, the surgical team abandoned its attempt at a robotic prostatectomy, and brought in the traditional laparoscopic equipment

to finish the surgery. At the time the surgical team abandoned their attempts to troubleshoot the robot, and before the regular laparoscopic equipment could be brought in and utilized, approximately forty-five (45) minutes had elapsed. Moreover, at the time the surgery was recommenced laparoscopically, Petitioner's bladder was not completely down. One week after Petitioner's surgery was completed laparoscopically due to the daVinci malfunction, he was readmitted to the hospital due to gross hematuria that manifested while he was in a public restroom. Petitioner's embarrassment was compounded due to the fact that his daughter was forced to assist him in getting to the hospital while blood was pouring out of his genitals.

As a direct result of the delay and subsequent laparoscopic procedure, Petitioner now suffers from total erectile dysfunction. Additionally, he experienced an episode of gross hematuria, which required hospitalization and irrigation of his bladder. He also suffers daily abdominal pain which prevents him from comfortably sleeping or sitting for an extended period of time.

B. *Procedural History*

Petitioner brought suit for his injuries against, among other parties, Defendant Intuitive Surgical.[1] Specifically, in Count II, Paragraphs 43-44, Petitioner averred that Respondent was liable, separate and apart from claims sounding in design and manufacturing defects, negligence, and breach of warranty, under a theory of strict malfunction liability:

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1. The only remaining defendant in the action is Respondent Intuitive Surgical, Inc.

43. The subject daVinci robot malfunctioned on June 9, 2005, and such malfunction was evidenced by, but not limited to the following:

(a) The subject daVinci robot did not work during the surgery;

(b) The subject daVinci robot displayed "Error" messages repeatedly during the surgery;

(c) The surgical team was forced to undock the subject robot from its trocars and restart it multiple times, before placing a call to Intuitive Surgical tech support;

(d) The local daVinci representative was unable to successfully assist the surgical team troubleshoot, repair, reboot, and/or otherwise operate the subject daVinci robot; and

(e) The daVinci machine robot would not permit the robotic camera arm to be utilized and/or manually repositioned during the surgery.

> **44. As a result of the above events, Plaintiff has successfully eliminated abnormal use or reasonable, secondary causes for the subject daVinci robot's malfunction, and is therefore permitted to seek recovery under strict malfunctioning liability as set forth in Restatement Third of Torts, Product Liability §3; see also *Harkins v. Calumet Realty Co.*, 614 A.2d 699, 705 (Pa.Super.1992).**

In response to Petitioner's Amended Complaint, Respondent filed no preliminary objections or Fed. R. C. P. 12(b)(6) Motions on the appropriateness of a malfunction liability claim, and instead filed a procedurally improper objection on the issue of *forum non convenins*. Thereafter, on December 8, 2008, Respondent filed a Motion for Summary Judgment, asserting that Petitioner could not meet his burden of proof to escape the summary judgment stage of litigation, due to the absence of expert reports. On December 22, 2008, Petitioner filed a timely Response in Opposition, demonstrating that he was proceeding under a malfunction theory of liability, wherein the defect was obvious to a layperson (i.e. flashing "ERROR" messages), and that he could establish the *prima facie* elements at trial through his testimony, and the testimony of his treating physicians ans surgeons, who are not obligated to submit expert reports, pursuant to the rules of civil procedure. On March 11, 2009, the Honorable Robert Kelly entered summary judgment in favor of Respondent, and as well as a Memorandum Opinion. On April 9, 2009, Petitioner timely noticed an appeal and both Petitioner and Respondent submitted briefs. The Third Circuit reviewed the entry of summary

judgment pursuant to a plenary standard. In upholding the decision by the Eastern District of Pennsylvania, the Third Circuit acknowledged in an unpublished memorandum opinion entered January 28, 2010, that although Petitioner was able to demonstrate a malfunctioning defect case through circumstantial evidence (instead of direct evidence), but nevertheless upheld the decision stating that Petitioner had failed to demonstrate a genuine dispute of material fact.

REASONS FOR GRANTING THE PETITION

A. The Circuit Court and District Court Failed to Hold Respondent to its Burden of Proving that No Genuine Issue of Material Fact Existed for Trial.

In the Commonwealth of Pennsylvania, and in the federal courts (pursuant to Fed. R. C. P. 56), the party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In the immediate case there is, unquestionably, significant factual evidence demonstrating that a jury (specifically, an arbitrator) could return an award in favor of Petitioner, who, as stated previously, was an anesthetized patient at the time a surgical robot that was being used on him, malfunctioned and every one of its component parts shut down.

This Honorable Court should note that Petitioner's **treating physicians**, including, among others, Dr. McGinnis (who is also an eyewitness to the malfunctioning incident), and Dr. Sinaiko (who will testify as to Petitioner's pre and post operative condition) will be subpoenaed to testify at arbitration, and will give testimony concerning Petitioner's pre and post incident medical condition, as well as authenticate and confirm the veracity of Petitioner's medical records. Moreover, as previously alluded to, Dr. McGinnis will be subpoenaed and will give testimony at the arbitration concerning the subject operation and the corresponding malfunction of the daVinci robot, and how said malfunction related to the surgery. Accordingly, there is a genuine issue of fact respect to the malfunction liability component of Petitioner's Complaint.

Notably, in a manufacturing defect case, in which the defect is obvious (i.e. a surgical robot, and all of its component parts shutting down after repeatedly flashing "ERROR" messages, and not being able to be restarted once the surgery has commenced, and ***after*** the patient has been cut open[2]), and heavily supported by a factual record, the circuit courts have recognized that it is not necessary for the plaintiff to furnish an expert report for a finding of defect, as such a finding is not beyond the purview of a layperson, presented with the factual record. In *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3d Cir. 1999), the Third Circuit aptly summarized the 'malfunction liability' cause of action in a products liability case (holding that it was error to grant summary judgment) as follows:

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2. RR at A82-A83.

We have not directly addressed the specific issue of when expert evidence is required in a products liability case although we have declared, in dictum, that "in addition to expert testimony on design defect, a defective condition in a product can be established by the presentation of other types of circumstantial evidence." *Barris v. Bob's Drag Chutes & Safety Equip., Inc.*, 685 F.2d 94, 101 (3d Cir. 1982) (citing Pennsylvania cases). We have, however, recently considered the issue in the context of a Jones Act negligence claim. In *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350 (3d Cir. 1998), plaintiff was swept off the deck of a tug when he was ordered to haul a line on board during a violent storm producing enormous waves causing the tug to roll and pitch. See *id.* at 357-59. The court held that the jury did not require expert evidence to understand that the reason plaintiff was in a position to be swept overboard was because he had been ordered to haul the line on deck and that if the line had been disconnected from the tug, there would have been no need to haul it on board, because "persons of common understanding could comprehend the primary facts offered by Wilburn to demonstrate the cause of his injuries." *Id.* at 359, 360.

Wilburn relied on *Salem v. United States Lines*, 370 U.S. 31, 8 L. Ed. 2d 313, 82 S. Ct. 1119 (1962), holding that expert testimony was not required to support a verdict of negligence and unseaworthiness in favor of Salem who had

been injured as he moved from a ladder to a platform leading to the vessel's crow's nest. The Court observed, after noting that there was evidence in the form of testimony and photographs from which the jury could clearly see the construction of the crow's nest, that if there were peculiar facts and circumstances which made it impossible for a jury to decide intelligently, it had not been told what they were and the record disclosed none. See *id.* at 34-35. Expert evidence is not necessary, the Court held, " 'if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation.' " *Id.* at 35 (quoting *United States Smelting Co. v. Parry*, 166 F. 407, 415 (8th Cir. 1909)). Here the district court opined, without explanation, that "this case presents complex and technical questions of product design and causation." But because this case is at the summary judgment stage, it is premature to rule out that testimony and pictures may enable the jury to clearly see the construction of the machine and the manner of its use, rendering expert evidence unnecessary. We hold only that on the record before us, we cannot exclude the possibility that plaintiff 's non-expert evidence will be sufficient to submit his claim of defect to the jury. *Id* at 415-416.

In this case, Petitioner intended to not only present significant factual evidence of the malfunction and resulting medical complications, but additionally, Petitioner's treating physicians and surgeons will testify at the arbitration regarding the obvious nature of the malfunction, which consisted of, *inter alia*, flashing "ERROR" messages, followed by a complete shutdown of the robot and all of its component parts. Moreover, Petitioner will personally testify as to his pre and post operative condition. Accordingly, it is respectfully submitted that it was error for the District Court and the Third Circuit to enter and uphold summary judgment, as Petitioner should have been permitted to prove his claim of malfunction liability against Respondent with "testimony and [medical reports]", pursuant to the Third Circuit's framework in *Padillas*.

Furthermore, Respondent's assertion (which was adopted by the District Court) that Petitioner cannot rule out "[o]ther secondary causes" for the incident and his injuries[3], is in **direct conflict** with both the factual record (specifically Plaintiff's medical records) as well as the procedure outlined by Pennsylvania state courts and federal courts, which permit **treating physicians**, who were not retained in anticipation of litigation, to testify regarding their observations (as set forth below), with the prerequisite of submitting an expert report. In this case, the observations include Petitioner's pre and post-operative condition, as well as the physicians' eyewitness accounts of the malfunctioning daVinci robot, which were memorialized, in part, in the operative report. (RR at A82-A83). Clearly, Petitioner has complied

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3. RR at A18

with all of the requirements set forth under Pennsylvania and federal statutes and caselaw to progress beyond the of summary judgment stage of litigation, and accordingly, Respondent's Motion for Summary Judgment should have been denied by the District Court (and should have been subsequently reversed by the Third Circuit), as genuine issues of material fact, in this malfunction liability case, existed..

B. Expert Reports are Not Required in this Case, Due to the Fact that Petitioner is Proceeding Under Malfunction Liability, and His Witnesses are His Treating Physicians.

In the March 11, 2009 Memorandum Opinion, the District Court laid significant emphasis on the lack of a liability expert report. This finding was subsequently relied upon by the Third Circuit in its affirmation of summary judgment in favor of Respondent. However, a treating physician, who was not retained in anticipation of litigation, is not required to tender a report, pursuant to Pa. R. C. P. 4003.5, and its federal counterpart, Fed. R. Civ. P. 26(b)(4). This Honorable Court will note that Pennsylvania Superior Court held in *Alwine v. Sugar Creek Rest, Inc.*, 338 A.2d 605, 610 (Pa. Super. 2005) as follows:

> Appellant first alleges that because Dr. Channapati testified as a medical expert, he was required to provide a pre-trial report pursuant to Pa.R.C.P. 4003.5. Therefore, Appellant argues that because Dr. Channapati did not provide a pre-trial report, the trial court should have precluded his testimony.

> The trial court found that Dr. Channapati was not required to provide a pre-trial report pursuant to Rule 4003.5 because he was not retained in anticipation of litigation. We agree.
>
> This Court has held that where a doctor's opinions and knowledge are acquired before an action commences, the doctor's "opinions proffered at trial fall outside the scope of Rule 4003.5." *Katz v. St. Mary's Hospital*, 2003 PA Super 37, 816 A.2d 1125, 1127 (Pa. Super. 2003). Presently, Dr. Channapati was the decedent's treating physician. His testimony related to his personal observations of the decedent in the months prior to her death. He testified regarding her condition and the care he provided to her. Dr. Channapati did not express any opinion regarding whether Appellee was negligent or breached the standard of care required for a personal care home. Thus, it is clear that Dr. Channapati's testimony regarding the decedent's condition was not offered as expert medical opinion and that he was not retained by Appellee in anticipation of trial. Accordingly, the trial court did not err in finding Rule 4003.5 inapplicable.[4]

4. As Petitioner indicated to the Third Circuit, the Eastern District of Pennsylvania has similarly ruled on the non-necessity of expert reports from treating physicians, based on the physicians' own observations. *See Buss v. Quigg*, 2002 U.S. Dist. LEXIS 15081 (E.D. Pa. 1997): "Treating physicians are not required to submit expert reports when testifying based on their examination, diagnosis and treatment of a patient." *See also Edwards v. Scott Paper Co.*, 1997 U.S. Dist. LEXIS 7417 (E.D. Pa. 1997).

Moreover, in the seminal Pennsylvania case of *Miller v. Brass Rail Tavern, Inc.*,541 Pa. 474, 664 A.2d 525, 530-532 (Pa. 1995), the Pennsylvania Supreme Court, likewise, held that individuals not retained in anticipation of litigation, such as Dr. McGinnis (who, along with his treating physician status, comprehensively documented the malfunction of the robot in the post operative report) and Dr. Sinaiko, are exempt from providing an expert report.

> Appellant argues that Rule 4003.5 does not apply to Coroner Wetzler because he was not hired in anticipation of litigation. Citing *Neal by Neal v. Lu*, 365 Pa. Super. 464, 530 A.2d 103 (1987), Appellant contends that "like its almost identical federal counterpart, Fed. R. Civ. P. 26(b)(4), Rule 4003.5 applies only to discovery of experts that a litigant has 'retained or specifically employed' in the course of preparing for litigation." (Appellant's Brief at 14). In support of that contention, Appellant submits that Coroner Wetzler's involvement in this case resulted solely from his official position within the county.
>
> Even though we have not heretofore addressed this specific issue, our Superior Court has addressed the parameters of the rule In *Neal by Neal v. Lu*, a defendant in a medical malpractice action offered his own opinion on plaintiff's prior medical treatment. Plaintiff objected to such opinion testimony, particularly because defendant had not identified himself as an expert witness during pre-trial discovery as

required in Pa.R.C.P. 4003.5. Noting that the explanatory notes to the rule specifically exempt party-experts from the rule, the Superior Court also observed that [defendant] did not "acquire" his opinions on the treatment of Rebecca's finger "in anticipation of litigation." He did not expend time and money developing his own knowledge or employing himself as an expert to gain a tactical advantage in the lawsuit brought against him by [plaintiff]. His opinions and knowledge, in short, were not the work product of a well-prepared litigant. They predated any litigation and are the very gist of [plaintiff's] cause of action. 365 Pa. Super. at 472-473, 530 A.2d at 108. Consequently, the Superior Court ruled that the defendant's opinions fell "outside any reasonable definition of the phrase 'acquired or developed in anticipation of litigation.'" *Id.*

In another related case, albeit federal, plaintiff sought to depose Dr. Aronson, the Medical Examiner for the City of Philadelphia. Defendants opposed that form of discovery, arguing that the federal rules, specifically Rule 26(b)(4), required plaintiff to proceed by interrogatory not by deposition. The United States District Court for the Eastern District of Pennsylvania concluded that the rule's "protection is not limitless, but applies only to experts who were consulted with an eye toward litigation." *Harasimowicz v. McAllister*, 78 F.R.D. 319, 320 (1978) (citing Wright & Miller, 8 Federal Practice & Procedure, Civil § 2033

> (1970)). In addition, the court held that Dr. Aronson made his examination without consulting defense counsel in this case and pursuant to his obligation to determine the cause of death. Indeed, the examination which forms the basis for Dr. Aronson's opinion was a matter of routine practice in the course of his duties as a City employee. (citation omitted). "We conclude that Dr. Aronson did not obtain or develop the information in anticipation of litigation or trial. Thus, he does not fall within the protective provisions of Fed. R.Civ.P. 26(b)(4) and he should be treated as an ordinary witness subject to deposition." *Id.*
>
> We agree. *Id* at 530-532.

Accordingly, Petitioner should not have been required to furnish expert reports on the issue of the causation of his injury in this case, because none of the doctors who will testify regarding his pre and/or post operative condition, or the operation itself, were retained in anticipation of litigation. Instead, these physicians will properly testify in person at the arbitration without the need for, or prerequisite of, expert reports. Moreover, Petitioner himself, who will testify regarding his pre and post operative condition, is likewise not required to furnish a report. Accordingly, it was inappropriate for the District Court to award summary judgment due to, *inter alia*, the absence of expert reports on causation.

CONCLUSION

For the reasons set forth in this Petition, or for which there is otherwise support in the record, Petitioner respectfully requests that this Honorable Court issue a Writ of Certiori on this matter, so as to address the significant legal conflicts between the immediate matter and the uniform course of decisions previously made on similar questions by the Third Circuit and other Courts of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 28, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2042

ROLAND C. MRACEK,

Appellant

v.

BRYN MAWR HOSPITAL;
INTUITIVE SURGICAL, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 08-cv-00296)
District Judge: Honorable Robert F. Kelly

Submitted Under Third Circuit LAR 34.1(a)
January 15, 2010

Before: SCIRICA, Chief Judge,
BARRY and SMITH, *Circuit Judges*

(Opinion Filed January 28, 2010)

Appendix A

OPINION

BARRY, Circuit Judge.

Roland Mracek appeals from the District Court's grant of summary judgment against him in this product liability case. We will affirm.

I.

On June 9, 2005, Mracek underwent a prostatectomy after he was diagnosed with prostate cancer. His surgeon intended to use the "da Vinci robot," which Mracek claimed was designed, manufactured, and sold by Appellee Intuitive Surgical, Inc. Mracek alleged that the robot malfunctioned during the surgery and displayed "error" messages. The surgical team attempted to make the robot operational, but was unable to do so. A da Vinci representative came to the operating room to assist but could not make the robot functional. Mracek's surgeon used laparoscopic equipment instead of the robot for the remainder of the surgery. One week later, Mracek suffered a gross hematuria and was hospitalized. He now has erectile dysfunction, which he had not suffered from prior to the surgery, and has severe groin pain.

Mracek filed a complaint in state court against Bryn Mawr Hospital and Intuitive Surgical, stating claims of strict product liability, strict malfunction liability, negligence, and breach of warranty. Bryn Mawr Hospital was voluntarily dismissed, and Intuitive Surgical

removed the case to the District Court. On March 11, 2009, the District Court granted Intuitive Surgical 's motion for summary judgment. Mracek timely appealed.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1332, and we have jurisdiction pursuant to 28 U.S.C. § 1291. Our review of an order granting summary judgment is plenary. *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 211 (3d Cir. 2009); *see* Fed. R. Civ. P. 56(c).

III.

Mracek argues that the District Court improperly granted summary judgment on his strict malfunction liability claim. Mracek does not contest the Court's rulings on his other three claims. *See Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 535 n.11 (3d Cir. 2007) (issues not briefed are deemed waived).

Generally, to establish a claim for strict liability, "a plaintiff must demonstrate, *inter alia*, that the product was defective, that the defect caused the plaintiff's injury, and the defect existed at the time the product left the manufacturer's control." *Barnish v. KWI Bldg. Co.*, 980 A.2d 535, 541 (Pa. 2009); *see* Restatement (Second) of Torts § 402A. When a plaintiff is unable to adduce direct proof of a defect, the malfunction theory of liability permits him or her to prove defect with circumstantial evidence. *Barnish*, 980 A.2d

at 541. To do so, a plaintiff must produce "evidence of the occurrence of a malfunction and . . . evidence eliminating abnormal use or reasonable, secondary causes for the malfunction." *Id.* (internal quotations and citation omitted). "[B]y presenting a case free of 'abnormal uses' by the plaintiff and free of 'other reasonable secondary causes,' a plaintiff can establish through inference from circumstantial evidence the second and third elements of a 402A case, that the alleged defect caused the injury (as opposed to another cause) and that the defect existed when it left the manufacturer's control (as opposed to developing after the product left the manufacturer's control)." *Id.* at 542.

Importantly, the malfunction theory does not relieve a plaintiff of his or her burden to present evidence creating a genuine dispute of material fact on each element in order to survive summary judgment. Rather, the malfunction theory simply permits a plaintiff to demonstrate these elements through circumstantial, instead of direct, evidence. *Id.* at 546-47.

The District Court held that Mracek did not offer any evidence to eliminate reasonable, secondary causes for the malfunction of the robot or to demonstrate that the malfunction caused his injury. Mracek contends that the Court erred in so holding because he would offer his own testimony and testimony from two treating physicians, including the surgeon who performed the procedure and his urologist who would testify about his pre- and post-operative condition. Although he did not submit any expert reports, Mracek argues that it was

unnecessary to do so because his treating physicians were not retained in anticipation of litigation, *see* Fed. R. Civ. P. 26(a)(2)(B), and because the alleged defect is obvious and easily understood by a jury given that the robot displayed "error" messages and was unable to complete the surgery, *see Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 415-16 (3d Cir. 1999) (expert evidence may be unnecessary where "testimony and pictures may enable the jury to clearly see the construction of the machine and the manner of its use").

However, separate and apart from whether summary judgment was proper because Mracek failed to produce any expert reports, it surely was proper because he failed to demonstrate a genuine dispute of material fact. Most importantly, there is no record evidence that would permit a jury to infer Mracek's erectile dysfunction and groin pain were caused by the robot's alleged malfunction.[1] *See Barnish*, 980 A.2d at 542 ("The courts have noted that while the plaintiff need not demonstrate the actual product defect, the plaintiff 'cannot depend upon conjecture or guesswork.'") (quoting *Dansak v. Cameron Coca-Cola Bottling Co.*, 703 A.2d 489, 496 (Pa. Super. Ct. 1997)). Accordingly, because Mracek did not "introduce evidence from which

1. The "Operative Report" describes the "malfunction" of the da Vinci robot, but does not discuss any cause of the malfunction. (App. at 81-83.) The medical records note Mracek's erectile dysfunction, but his urologist did not opine on the cause of that condition. *See, e.g., id.* at 92 ("[Mracek] had very successful laparoscopic radical prostatectomy several months ago. . . . His only problem at this time is erectile dysfunction.").

a rational finder of fact could find in [his] favor," *Woloszyn v. County of Lawrence,* 396 F.3d 314, 319 (3d Cir. 2005), the District Court properly granted summary judgment against him.

IV.

We will affirm the judgment of the District Court.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 28, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2042

ROLAND C. MRACEK,

Appellant

v.

BRYN MAWR HOSPITAL;
INTUITIVE SURGICAL, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 08-cv-00296)
District Judge: Honorable Robert F. Kelly

Submitted Under Third Circuit LAR 34.1(a)
January 15, 2010

Before: SCIRICA, Chief Judge, BARRY and SMITH, *Circuit Judges*

Appendix B

JUDGMENT

This cause came to be heard on appeal from the District Court for the Eastern District of Pennsylvania and was submitted on January 15, 2010.

After consideration of all the contentions raised, it is

ADJUDGED and ORDERED that the judgment of the District Court be and hereby is affirmed. Cost taxed against appellant. All in accordance with the Opinion of the Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: January 28, 2010

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED MARCH 11, 2009

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

No. 08-296

ROLAND C. MRACEK,

Plaintiff,

v.

BRYN MAWR HOSPITAL, and
INTUITIVE SURGICAL, INC.,

Defendants.

MEMORANDUM

ROBERT F. KELLY, Sr. J. **MARCH 11, 2009**

Roland C. Mracek ("Mracek") brought this action against Bryn Mawr Hospital and Intuitive Surgical, Inc. ("Intuitive") for damages arising out of strict product liability, strict malfunction liability, negligence, and breach of warranty in connection with a

prostatectomy [1] performed with an operative robot called the "da Vinci" which was manufactured by Intuitive. Presently before this Court is a Motion for Summary Judgment filed by Intuitive. For the reasons set forth below, the Motion is granted with regard to all causes of action.

I. BACKGROUND

In October 2004, Mracek had a prostate biopsy performed which resulted in positive results for adenocarcinoma [2] of the prostate. Thereafter, in January 2005, Mracek met with Dr. David McGinnis of the Bryn Mawr Urology Group to discuss his options of treatment. Mracek asserts that he informed Dr. McGinnis that he did not suffer with erectile dysfunction, and was quite concerned about erectile dysfunction being a result of any treatment of his prostate cancer. Mracek met again with Dr. McGinnis on March 31, 2005, at which time, Dr. McGinnis informed him that the da Vinci surgical robot ("robot") would be used for the radical prostatectomy, so as to minimize the risk of erectile dysfunction. The surgery was scheduled for June 9, 2005. On this date, Mracek's surgery began with him being put under general anesthesia while the robot was brought in and

1. Prostatectomy– surgical removal of the prostate or a part of it. *Dorland's Illustrated Medical Dictionary*, Twenty-eighth Edition, at 1366 (1994) ("Dorland's").

2. Adenocarcinoma– carcinoma derived from glandular tissue or in which the tumor cells form recognizable glandular structures. *Dorland's* at 25.

readied. According to Mracek's Complaint, the surgical team, led by Dr. McGinnis, proceeded part way into the surgery, "taking his bladder down," and "dividing the urachus,"[3] when suddenly, the robot starting displaying error messages. The surgical team restarted the robot and was only able to make a small amount of progress before the machine again started displaying error messages. As a result, the surgical team was forced to "undock the robot from its trocars,"[4] and attempted to restart it several times. They also attempted to place a call to Intuitive's tech support. A tech representative for the robot subsequently came to the operating room, and attempted to assist the surgical team troubleshoot the problems with the robot, including "repositioning the robot's arms and multiple redocking of the robot." It, however, failed to function.

Dr. McGinnis made a final attempt to use the robot by trying to use the robotic arm to run the camera while he did the rest of the surgery laparoscopically.[5] This attempt, however, failed when the machine would not

3. Urachus– a canal in the fetus that connects the urinary bladder with the allantois; it persists throughout life as a fibrous cord into which a patent canal may extend for part of the distance to the umbilicus. *Dorland's* at 1777.

4. Trocar– a sharp-pointed instrument equipped with a cannula, used to puncture the wall of a body cavity and withdraw fluid. *Dorland's* at 1748.

5. Laparoscope– an instrument comparable to an endoscope which, when inserted into the peritoneal cavity, permits it to be inspected. *Dorland's* at 900.

allow the team to manually reposition the arm. As a result of the machine's malfunction, the surgical team abandoned its attempt at a robotic prostatectomy, and brought in the laparoscopic equipment to finish the surgery. Between the time the team abandoned use of the robot and the time the laparoscopic equipment was brought in and utilized, approximately forty-five (45) minutes had elapsed.

One week after the surgery was completed laparoscopically, Mracek was readmitted to the hospital due to a gross hematuria that occurred while he was in a public restroom, which required his daughter to assist him getting to the hospital while blood was pouring out of his genitals. Mracek now contends that, as a direct result of the delay and subsequent laparoscopic procedure, he now suffers from total erectile dysfunction, and suffers daily abdominal pain which prevents him from comfortably sleeping or sitting for an extended period of time. Mracek subsequently filed suit against the Defendants[6] for strict products liability, negligence, breach of warranty, and strict malfunction liability in the Court of Common Pleas of Philadelphia. The matter was then removed to this Court on January 17, 2008.

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6. Defendant, Bryn Mawr Hospital, was voluntarily dismissed from this action by Order of the Court of Common Pleas of Philadelphia on December 21, 2007. Thus, Intuitive remains the sole defendant in this action before us.

Appendix C

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) states that summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *See also Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991). The Court asks "whether the evidence presents a sufficient disagreement to require submission to the jury or whether . . . one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" *Compton v. Nat'l League of Prof'l Baseball Clubs*, 995 F. Supp. 554, 561 n.14 (E.D. Pa. 1998).

Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Once the moving party has produced evidence in support of summary judgment, the non-moving party must go beyond the allegations set forth in its pleadings and counter with evidence that

presents "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see *Big Apple BMW, Inc. v. BMW of N. Am. Inc.*, 974 F.2d 1358, 1362-63 (3d Cir. 1992). "More than a mere scintilla of evidence in its favor" must be presented by the non-moving party in order to overcome a summary judgment motion. *Tziatzios v. United States*, 164 F.R.D. 410, 411-12 (E.D. Pa. 1996). If the court determines that there is no genuine issues of material fact, then summary judgment will be granted. *Celotex*, 477 U.S. at 322.

III. DISCUSSION

1. Strict Products Liability

Intuitive asserts that, since Mracek has failed to submit any expert report that is critical of the da Vinci robot, he cannot meet his burden of proof with respect to any of the theories of liability that he has asserted, including strict liability. We agree, and find that summary judgment should be granted for several reasons, as will be discussed *infra*.

In *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853, 854 (Pa. 1966), the Pennsylvania Supreme Court adopted § 402A of the Restatement (Second) of Torts as the law of strict products liability in Pennsylvania.[7] The Court

7. Section 402A of the Restatement (Second) of Torts (1965) provides that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or
>
> (Cont'd)

subsequently established that § 402A "imposes strict liability in tort not only for injuries caused by the defective manufacture of products, but also for injuries caused by defects in their design." *Lewis v. Coffing Hoist Div., Duff-Norton Co.*, 515 Pa. 334, 528 A.2d 590, 592 (Pa. 1987). In order to bring a products liability action in Pennsylvania, a plaintiff must demonstrate that: (1) the product was defective; (2) the defect existed while the product was in the control of the manufacturer; and (3) the defect was the proximate cause of the plaintiff's injuries. *Walton v. Avco Corp.*, 530 Pa. 568, 610 A.2d 454, 458-59 (Pa. 1992).

As noted above, Intuitive argues that Mracek has failed to meet his burden of proof for strict liability because he has not submitted an expert report that is critical of the da Vinci robot. This Circuit has held that expert testimony is not required when the matter under

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(Cont'd)

> consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The Rule stated in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

consideration is simple and a lack of ordinary care is obvious and within the range of comprehension of the average juror. *Oddi v. Ford Motor Co.*, 234 F.3d 136, 159 (3d Cir. 2000); *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3d Cir. 1999). *Oddi* held that "although expert evidence is generally required in a products liability case where a defect is alleged, we have never foreclosed the possibility that a defective condition may be established through non-expert evidence." *Id.* at 159.

Thus, because the absence of expert testimony is not fatal to a products liability case, the proper analysis is whether the asserted defect is obvious enough to be ascertainable by the average juror without speculation. Mracek contends that an expert report is not necessary because the surgeon who performed his operation, Dr. McGinnis, will testify at trial concerning not only his pre and postoperative medical condition, but also the malfunction of the da Vinci robot. Mracek maintains that the defect of the surgical robot is obvious because all of its component parts shut down after repeatedly flashing "error" messages, and then was not able to be restarted once the surgery commenced. Mracek argues that it is not necessary for him to produce an expert report for a finding of an obvious defect, as such a defect is not beyond the purview of a layperson when presented with this factual record. Intuitive asserts that the average juror does not have the requisite background to adjudicate and reach a conclusion as to whether the machine was defective, and such a lack of expert testimony would only lead to jury speculation.

Appendix C

Our Circuit's decisions in *Padillas* and *Oddi* guide our analysis. In *Padillas*, the court found that a juror could look at a chicken cutter with exposed blades and determine whether it was defective for not having a guard to cover the blades. *Padillas*, 186 F.3d at 415-16. In *Oddi*, the court granted summary judgment to the defendant because it found that a juror could not look at a bread truck and reasonably conclude whether a bumper was defective without expert testimony. *Oddi*, 234 F.3d at 159-60. The Court explained that the truck Oddi was driving is not at all like the chicken cutter with exposed blades in *Padillas*. A whirling cutting blade without a proper guard is obviously dangerous. It could reasonably be regarded by a lay juror as a design defect. The Court added that "[W]e do not believe that a juror could look at the front bumper and the flooring of the cab of the truck Oddi was driving and reasonably conclude, not only that its design was defective, but also that testing would have disclosed the defect and that it could have been remedied. Such conclusions are within the peculiar competence of experts. *Id.*

We are of the opinion that the instant case is more akin to *Oddi* than *Padillas*. Here, Mracek asserts that the defect in the da Vinci robot is obvious because it displayed error message and had to be shut down during the operation. We disagree. It is apparent that the da Vinci is a complex machine, one in which a juror would require the assistance of expert testimony in order to reasonably determine if the robot had a defect. A surgical assistant robot is a more technical and complex machine than even the car bumper in *Oddi*.

Appendix C

Mracek has only submitted the operative report of Dr. McGinnis in defense of this summary judgment motion. In such, Dr. McGinnis give a narrative of the robot failing to function properly, but he does not opine that the robot has a defect.[8] For all we know at this stage of this

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8. Dr. McGinnis stated in this report that:

> [We] got part way through taking the bladder down and dividing the urachus when we ran into fault and error messages. We were able to get [it] restarted and get going and our situation improved and we were able to progress some. We had to stop again because of error messages. We undocked the robot from its trocars and restarted it, we actually did this more than 1 time throughout our troubleshooting the robot. We had several phone calls to tech support. Our local representative John Bretanal was not initially in the room but he came into the room as we were troubleshooting and helped with troubleshooting the robot. Initially, it appeared that the yellow robotic arm was malfunctioning. We attempted to put it off to the side, swinging the fourth arm over to the yellow arm side and redocking the robot. However, it would initially function for awhile and then it would not function properly. We again restarted the robot and still were not able to get it to properly function. I wanted to use the robotic camera arm to run the camera for me to do the rest of the case laparoscopically but this would not work either. At this point the robot would not allow us to even manually clutch the camera arm around. I removed the robot completely and or the staff helped me get regular laparoscopic equipment in which included bipolor forceps, some sets of regular

(Cont'd)

litigation, Dr. McGinnis could have used that same da Vinci robot in dozens of previous operations without any trouble. Mracek asserts that McGinnis will be subpoenaed to testify at trial. However, this does not fulfill his burden of presenting evidence of a defect at this time to withstand summary judgment. McGinnis neither offered an opinion as an expert on the da Vinci in his operative report, nor does Mracek even assert that he is an expert on the working of such. Thus, without an expert report, Mracek cannot establish that the da Vinci robot had a defect under a strict products liability theory.

In addition and even more fatal to Mracek's cause of action for strict products liability is his failure to submit any evidence of causation between what occurred in the operating room with the da Vinci robot and his erectile dysfunction. As noted above, Mracek asserts that Dr. McGinnis will be called to testify at trial concerning the malfunction of the robot and how said malfunction related to the surgery. Mracek also maintains that Dr. Peter Sinaiko, his treating urologist,

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(Cont'd)

> laparoscopic instruments and we brought the Esops' into the room, hooked it up to Hermes', docked it to the operating table and got it up and running. We abandoned trying to troubleshoot the da Vinci probably around 10:45 and we got the regular laparoscopic equipment up and running with Esop and so forth probably around 11:30.

(*See* Resp. Def.'s Mot. Summ. J., Ex.B.)

will testify as to his pre and post operative condition. Mracek argues that a treating physician, who was not retained in anticipation of litigation, is not required to tender a pre-trial expert report in order to testify as to a patient's medical condition at trial. *Alwine v. Sugar Creek Rest, Inc.*, 2005 PA Super 291, 883 A.2d 605, 610 (Pa Super. 2005); *Buss v. Quigg*, No. 01- 3908, 2002 U.S. Dist. LEXIS 15081, 2002 WL 32345703, at * 1 (E.D. Pa. Aug. 5, 2002). Mracek argues that he is not required to furnish expert reports on the issue of causation of his injuries in this case because none of the doctors who will testify regarding his pre and/or post operative condition were retained in anticipation of litigation.

Mracek's argument, however, is severely flawed. It is agreed that treating physicians are not required to submit expert reports when testifying based on their examination, diagnosis and treatment of a patient. *See Edwards v. Scott Paper Co.*, 1997 U.S. Dist. LEXIS 7417, *5 (E.D. Pa. May 23, 1997). Thus, Drs. McGinnis and Sinaiko would be able to testify at trial regarding their treatments and diagnoses of Mracek. However, the fact that they can testify at trial regarding such does not relieve Mracek of his burden to produce evidence of causation in defending a motion for summary judgment. Nor, does Mracek produce any authority supporting such a position.

In support of his opposition to summary judgment, as noted above, Mracek has submitted an operative report from Dr. McGinnis which details the surgical procedure and mechanical problems with the da Vinci

robot, but it does not include any causation between the problems with the robot and Mracek's erectile dysfunction. In addition, Mracek produced summaries of office visits to Dr. Sinaiko. A review of these reports, indicate that Dr. Sinaiko never opined in any of them that the surgical problems with the robot caused Mracek's erectile dysfunction. In fact, in a letter dated September 1, 2005 to Dr. McGinnis, Dr. Sinaiko indicated that the surgery was "successful." Dr. Sinaiko wrote, "Mr. Roland Mracek was seen here today. As you know, he had very successful laparoscopic radical prostatectomy several months ago. He is perfectly continent. His only problem at this time is erectile dysfunction." (*See* Resp. Def.'s Mot. Summ. J., Ex.B, at 7.)

As stated above, summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Mracek has failed to produce any evidence of causation,[9] and thus, summary judgment will be entered against him with regard to this products liability cause of action. Moreover, as will be discussed, *infra*, Mracek's

9. In fact, Mracek acknowledges in his Response to the Motion for Summary Judgment that Dr. McGinnis told him that the da Vinci robot would be used for the surgery "so as to minimize the risk of erectile dysfunction." (*See* Resp. Def.'s Mot. Summ. J., at 3) There is no evidence in this record that had there been no problems with the robot, erectile dysfunction would not have resulted.

lack of evidence regarding causation is fatal to his other causes of actions as well.

2. Breach of Warranty

Intuitive, next, claims that Mracek cannot establish a cause of action for breach of warranty. The standards of § 402A of the Restatement (Second) of Torts apply to breach of warranty as well as strict liability. *Kridler v. Ford Motor Co.*, 422 F.2d 1182, 1184 (3d Cir. 1970). The elements of proof required to demonstrate breach of warranty are similar to those required to establish a strict liability action. *Simeone v. Bombardier-Rotax GMBH*, 360 F. Supp. 2d 665, 680 n. 5 (E.D. Pa. 2005).

Intuitive argues that, for the same reason that Mracek has failed to establish a cause of action for strict products liability, he has failed to do so for breach of warranty. We agree, and again find that for the same reasons that we granted summary judgment for strict products liability, we do so also for breach of warranty.

3. Strict Malfunction Liability

Mracek has also brought a cause of action under a malfunction theory of products liability. In those cases where a plaintiff is unable to produce direct evidence of a product's defective condition, and thus, the precise nature of the product's defect, a plaintiff, in appropriate cases, can rely on the "malfunction theory" of products liability. *Woodin v. J.C. Penney Co.*, 427 Pa. Super. 488, 629 A.2d 974, 975 (Pa. Super. Ct. 1993), citing *Rogers v.*

Johnson & Johnson Products, Inc., 523 Pa. 176, 565 A.2d 751, 754 (Pa. 1989). This theory permits a plaintiff to prove a defect through circumstantial evidence. Plaintiff may raise a supportable inference of defect through: (1) evidence of the occurrence of a malfunction; (2) evidence eliminating abnormal use; and (3) evidence eliminating reasonable secondary causes for the accident. *Id.* If such evidence is present, the plaintiff is relieved from demonstrating the precise defect in the product and the trier of fact is permitted to infer the existence of a defect from the malfunction and the negation of abnormal use and other reasonable secondary causes. *Id.*

Establishing a prima facie case under a malfunction theory does not require a plaintiff to proffer expert testimony to prove how the product was defective or how the defect arose as a result of actions taken by the manufacturer. *Dansak v. Cameron Coca-Cola Bottling Co. Inc.*, 703 A.2d 489, 498 (Pa. Super. Ct. 1997). Instead, a plaintiff may sustain his burden without articulating a specific defect by producing: (1) circumstantial evidence of a malfunction; and (2) evidence indicating (a) the product was being used as intended or reasonably expected, and (b) the absence of other reasonable secondary causes. *Altronics*, 957 F.2d at 1105; *Dansak*, 703 A.2d at 496.

Intuitive argues that summary judgment is appropriate where "based upon [the plaintiff's] own proof, more than one cause could account for the accident." *Dansak*, 703 A.2d at 497, and that Mracek

has entirely failed to eliminate any reasonable, secondary causes of the incident giving rise to the Complaint. Intuitive asserts that:

> This is a matter of complex surgical innovation—a robotic procedure requiring a multitude of medical decisions and judgments made by the surgeon. The use and timing of various ancillary medical equipment in connection with this innovative and complex procedure reinforces that any number of reasonable secondary causes could or were responsible for the alleged damages.

(Def's Mot. Summ. J. at 6). We agree.

"Summary judgment is not warranted simply because the defendant hypothesizes (or even presents evidence of) reasonable secondary causes." *Dansak*, 703 A.2d at 497. Instead, it is appropriate only where, "based upon the [the plaintiff's] own proof, more than one cause could account for the accident." *Id.* (quoting *Shiller v. Milwaukee Elec. Tool Corp.*, 835 F. Supp. 839, 841 (E.D. Pa. 1993)). Here, Mracek has offered no evidence to eliminate any reasonable secondary causes, and thus, he has failed to meet his burden under the malfunction theory of strict products liability.

In addition, even if such evidence was produced, Mracek is not relieved from submitting evidence of the other elements of a products liability cause of action. Again, Mracek's lack of evidence with regard to the

causation element is also fatal to this cause of action, and summary judgment is appropriate.

4. Negligence

Lastly, Mracek has claimed a cause of action for negligence. A negligence claim may stand even in the absence of a "defect" under strict liability principles. *Hittle v. Scripto-Tokai Corp.*, 166 F. Supp. 2d 142, 152 (M.D. Pa. 2001); *Griggs v. BIC Corp.*, 981 F.2d 1429 (3d Cir. 1992). A prima facie negligence claim requires the plaintiff to show that: (1) the defendant had a duty to conform to a certain standard of conduct; (2) the defendant breached that duty; (3) such breach caused the injury in question; and (4) the plaintiff incurred actual loss or damage. *Krentz v. Consol. Rail Corp.*, 589 Pa. 576, 910 A.2d 20, 27-28 (Pa. 2006).

However, again, Mracek [HN17]has not produced evidence of causation., and there is no genuine issue of material fact regarding this element of negligence that can be given to a jury. Accordingly, summary judgment is granted as to all Mracek's causes of action.

An appropriate Order follows.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

No. 08-296

ROLAND C. MRACEK,

Plaintiff,

v.

BRYN MAWR HOSPITAL, and
INTUITIVE SURGICAL, INC.,

Defendants.

ORDER

AND NOW, this 11th day of March, 2009, upon consideration of Defendant, Intuitive Surgical, Inc.'s, Motion for Summary Judgment (Doc. No. 7), and Plaintiff, Roland C. Mracek's, Response and the Exhibits attached thereto, it is hereby **ORDERED** that Defendant's Motion is **GRANTED**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY
SENIOR JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED MARCH 11, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 08-296

ROLAND C. MRACEK

v.

BRYN MAWR HOSPITAL, et al.

ORDER

Before the Honorable Robert F. Kelly

AND NOW, this 11TH day of March, 2009, in accordance with the Court's Memorandum and Order filed on this date,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant Intuitive Surgical, Inc. and against the plaintiff (Defendant Bryn Mawr Hospital was dismissed before this case was removed from state court).

BY THE COURT

ATTEST: s/ Thomas Garrity
Thomas Garrity
Deputy Clerk